88-987

No. 88-

Supreme Court, U.S.
FILED
DEC 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1988

DAVID HESSE,

Petitioner,

v.

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, COOK COUNTY, ILLINOIS, ROBERT CREEK, ANNA COUNTRYMAN, ANNE KOLLER, JOSEPH MARCHIORI, JAMES ROGERS, ROBERT SEGER, RICHARD C. KOLZE and JACK GAZA,

Respondents.

On Writ Of Certiorari To The
United States Court of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

MARILYN F. LONGWELL
29 South LaSalle Street
Suite 334
Chicago, Illinois 60603
(312) 263-4730

Attorney for Petitioner

Pandick Technologies, Inc., Chicago • (312) 236-0200

No. 88-

In The
Supreme Court of the United States
October Term, 1988

DAVID HESSE,

Petitioner,

v.

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, COOK COUNTY, ILLINOIS, ROBERT CREEK, ANNA COUNTRYMAN, ANNE KOLLER, JOSEPH MARCHIORI, JAMES ROGERS, ROBERT SEGER, RICHARD C. KOLZE and JACK GAZA,

Respondents.

On Writ Of Certiorari To The
United States Court of Appeals
For The Seventh Circuit

QUESTIONS PRESENTED

1. Is the determination of whether a teacher's speech is on a matter of public concern an objective test, governed primarily by subject matter, or a subjective one, in which the motive, intent or tone of the speaker is a prime factor?

2. Does the fact that a teacher has differences of opinion with the school administration on issues which would

otherwise be of public concern remove his speech on those issues from First Amendment protection?

3. In applying the balancing test for First Amendment protection to speech of a public school teacher is the embarrassment of a few teachers, without more, sufficient to counterbalance the teacher's interest in speaking out?

4. To the extent that factual issues are a part of the legal determination as to the protected nature of public employee speech, how much deference should be given to the findings of the trial court which has observed the witnesses and heard the testimony?

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

REFERENCE TO THE OPINIONS DELIVERED BELOW 1

STATEMENT OF GROUNDS INVOKING JURISDICTION OF SUPREME COURT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

APPENDIX A1

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

Page(s)

First Amendment 1, 5

UNITED STATES STATUTES

28 U.S.C. §1254(1) 1

42 U.S.C. §1983 ..... 2, 5

42 U.S.C. §1988 2

Cases:

American Postal Workers Union v. United States Postal Service, 830 F.2d 294, (D.C. Cir., 1987) 10

Berger v. Bettaglia, 799 F.2d 992 (4th Cir., 1985) 7

Bowman v. Pulaski County Special School Dist., 723 F.2d 640 (8th Cir., 1983) 6

Callaway v. Hafeman, 832 F.2d 414 (7th Cir., 1987) 7

Conaway v. Smith, 853 F.2d 789 (10th Cir., 1988) 8

Connick v. Myers, 461 U.S. 138 (1983) 5, 6, 7, 9, 10

Eiland v. City of Montgomery, 797 F.2d 953 (11th Cir., 1986) 6

Fowler v. Board of Education of Lincoln County, Kentucky, 819 F.2d 657 (6th Cir., 1987) 8

Cases: *Page(s)*

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979) 7

Greenberg v. Kmetko, 840 F.2d 467 (7th Cir., 1988) . . 11

Hale v. Ford, 856 F.2d 255 (D.C. Cir., 1988) 7

Jackson v. Bair, 851 F.2d 714, (4th Cir., 1987) 10

Joyner v. Lancaster, 815 F.2d 20 (4th Cir., 1987) 7

Jurgenson v. Fairfax Co., 745 F.2d 868 (D.C. Cir., 1984) 8, 10

Keyishian v. Board of Regents, 385 U.S. 589 (1967) . . . 9

Koch v. City of Hutchinson, 847 F.2d 1435 (10th Cir., 1988) 8

Kurtz v. Vickrey, 855 F.2d 723, (11th Cir., 1988) 7

Pickering v. Board of Education, 391 U.S. 563 (1968) 8, 9

Rankin v. McPherson, ____U.S.____ 107 S.Ct. 2891 (1987) 9, 10

Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir., 1988) . 7, 8

Sweezy v. New Hampshire, 354 U.S. 234 (1957) 9

Vukadinovich v. Bartels, 853 F.2d 1387 (7th Cir., 1988) 8

Zamboni v. Stamler, 1847 F.2d 73 (3d Cir., 1988) . 7, 10

LAW REVIEW ARTICLES

Page(s)

"*Connick v. Myers*: New Restrictions on the Free Speech Rights of Government Employees," 60 *Indiana L.J.* 339 (1984-85) 11

Note, "Public Employees and the First Amendment: *Connick v. Myers*," 15 *Loyola Univ. L.J.* 293 (1984) 11

"The Public Employee's Right of Free Speech: A Proposal for a Fresh Start," 55 *Univ. of Cincinnati L.Rev.* 449 (1986-87) 11

REFERENCE TO THE OPINIONS DELIVERED BELOW

The case was tried to a jury in the United States District Court from May 28 to June 4, 1986. The trial court found plaintiff's speech on issues of student discipline, grading and teacher evaluation procedures to be protected speech. Judgment was entered on the Jury's verdict in favor of the Plaintiff on June 4, 1986.

Defendants appealed to the Court of Appeals which rendered its decision on June 10, 1988 reversing the Judgment of the Dictrict Court. (848 F.2d 748)

A timely Petition for Rehearing with Suggestion for Rehearing en Banc was filed by the Plaintiff. The Court of Appeals denied a Rehearing and a Rehearing en Banc on September 9, 1988.

STATEMENT OF GROUNDS INVOKING JURISDICTION OF SUPREME COURT

(i) The Opinion of the Court of Appeals was entered on June 10, 1988.

(ii) A timely Petition for Rehearing was filed; Rehearing was denied on September 9, 1988.

(iii) 28 U.S.C. §1254(1) authorizes this petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the United States Constitution

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. §1983

§1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1988

§1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of

this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the cost.

STATEMENT OF THE CASE

Plaintiff, David Hesse, has been an art teacher in Township High School District 211 since 1977. From 1977 until June 1983, the principal supervising Mr. Hesse was Carl Weimer. Under Mr. Weimer, Hesse received a number of evaluations indicating that his performance was average or above and one or more in which a problem was noted. (Pl. ex. 2-7, T. 23-26) In response to some critical memos from Weimer, Hesse authored memoranda which were, *inter alia*, critical of school district policies on student grading and discipline. (Pl. ex. 9, T. 38) No action was taken against Hesse because of these memos.

In September 1983 defendant, Jack Gaza, became principal at Hesse's school. In the fall of 1983, Mr. Gaza called Mr. Hesse to his office to discuss an incident in which Hesse had become angry with his students to impress them with the dangerousness of the equipment in the room. In a subsequent memo, Gaza expressed the opinion that Mr. Hesse viewed himself as a "crusader for the improvement of the system." (Def. ex. 16, T. 43-45; 260-262)

In the winter of 1983-84, on Mr. Hesse's evaluations some areas of needing improvement were noted as were Hesse's "strong differences with the American education system...." (Pl. ex. 13)

On March 2, 1984 Hesse attended a district teachers' conference at which a guest speaker, Dr. Clark, discussed issues of global education. Plaintiff, and later some other teachers, sat in a section of the auditorium where two or three rows had been taped off with masking tape. (T. 46-51) During a question and answer period, plaintiff raised issues of grade inflation, student disciplinary policies and the use of teacher evaluations to stifle teacher dissent. Two

witnesses claimed at trial to have been embarrassed by Mr. Hesse's questions. (T. 391, 395) Subsequent to the teachers' conference, Gaza and Hesse exchanged memos regarding Hesse's behavior at the conference. (Pl. ex. 14-17, T. 53-56)

Shortly after the conference, Gaza assigned Assistant Principal Maddox and Art Department Chair Wheat to draft some "Goals and Objectives" for Hesse, allegedly to remedy his deficiencies in teaching as outlined in his evaluations. (T. 265-266) Gaza then drafted the final document which differed substantially from the Maddox-Wheat notes. At trial, Wheat testified that Hesse was already doing most of the tasks listed in the final document.

Mr. Hesse was presented with the "Goals and Objectives" at a conference on April 25, 1984 and was then evaluated four times in the following two weeks. None of the evaluations reported problems in the areas of the goals and objectives. (T. 63-65, 74-75, Pl. ex. 21-24) Nevertheless, on May 31, 1984 the Board of Education passed a resolution authorizing a "Notice to Remedy" (the first step toward dismissal of a tenured teacher) incorporating the Goals and Objectives as presented to Hesse on April 25. (Pl. ex. 25) Additionally, the Board passed a resolution requiring the plaintiff to undergo a psychiatric evaluation for review by the Board. (Pl. ex. 25) Hesse was told he would be fired if he did not comply. (The demand was later withdrawn in response to a letter by Hesse's attorney.)

In early fall of 1984 Gaza held a meeting with Assistant Principals Kramper and Maddox and Art Department Chair Wheat. Gaza informed them that they should document any of Hesse's behaviors which could be construed as not conforming to the Notice to Remedy and that they should not include anything positive on Hesse's evaluations. (T. 254-255, 274-275, 296-298, Pl. ex. 53) During the fall and winter Mr. Hesse was evaluated numerous times and received a number of negative comments

on each although the Board of Education took no further action to terminate him. Several memos were placed in his personnel file regarding moving his art class outdoors in the spring without advance permission and other claimed transgressions.

For the 1985-86 school year Hesse was transferred to a position traveling between two schools to teach art. In 1986-87 he was again assigned to a school full time.

Suit was filed in November 1985 pursuant to 42 U.S.C. §1983 and the First Amendment to the United States Constitution. The trial court found that Hesse's speech on matters of student discipline, grading and teacher evaluation procedures were on matters of public concern and were entitled to First Amendment protection and the jury was so instructed. The jury returned a verdict in favor of the plaintiff and judgment was entered on the verdict.

On appeal, the Court of Appeals panel, with one dissent, found that only one memorandum written by Hesse was on a matter of public concern because all of his other remarks on the discipline, grading, and evaluation issues grew out of his private disagreement with school district policies. The Court further held that the employer's interest in a harmonious workplace outweighed the teacher's interest in free speech.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUIT COURT OPINIONS IN ITS APPLICATION OF THE CONNICK TEST AS A SUBJECTIVE MEASURE

In *Connick v. Myers*, 461 U.S. 138 (1983) this Court refined the test for determining whether to accord First Amendment protection to speech by public employees. The questions for the Court are: 1) Is the speech on a matter of public concern? and 2) Do the interests of the employer in operating efficiently outweigh the employee's interests in speaking?

Although the *Connick* decision was apparently meant to provide an objective test for determining whether a dispute over an employee's speech merits federal court intervention, many lower courts, including the Circuit Court in the instant case, have transformed the test into a subjective one, leading to widely varying and conflicting decisions.

A. THE QUESTION OF WHETHER SPEECH IS ON A MATTER OF PUBLIC CONCERN WAS INTERPRETED SUBJECTIVELY IN THE COURT BELOW CONTRARY TO OTHER CIRCUIT COURTS

In the case at bar, the subjects of student discipline, grading and teacher evaluation procedures are certainly matters of public concern since "what constitutes the proper care and education of children is one of the most frequently debated issues in the public forum." *Bowman v. Pulaski County Special School Dist.*, 723 F.2d 640, 644 (8th Cir., 1983). Indeed, a substantial portion of this Court's caseload has involved educational issues.

The Court below looked primarily to Hesse's *disagreement* with the school district on issues of discipline, grading and teacher evaluation and interpreted his *intent* as removing the issue from the realm of public concern: "... Hesse was not attempting to speak out as a citizen concerned with the problems facing the school district, but was instead attempting to articulate his own *private* disagreement with policies and procedures..." (emphasis added, see appendix, p. A-10). The one memorandum which the majority conceded was "arguably" on a matter of public concern was noted to be less sarcastic and offensive. Although the majority denied the dissent's accusation that the sarcastic nature of Hesse's speech caused them to devalue his sentiments, the opinion makes clear the fact that such a standard was used to judge Hesse's speech. (Compare the poem posted by the plaintiff police officer in

Eiland v. City of Montgomery, 797 F.2d 953 (11th Cir., 1986).)

Thus, the tone and the intent of the speaker were given considerable weight over the subject and content of the speech. The Seventh Circuit used similar reasoning to deny the classification of public importance to a claim of sexual harassment because the employee's *goal* in speaking was not to effect social change generally. *Callaway v. Hafeman*, 832 F.2d 414 (7th Cir., 1987) Likewise in *Joyner v. Lancaster*, 815 F.2d 20 (4th Cir., 1987) the Fourth Circuit held that the plaintiff's motive of personal advancement disqualified his participation in an election campaign from First Amendment protection.

By contrast, other Circuits, while noting that the "meaning of the term 'public concern' is not without ambiguity," *Kurtz v. Vickrey*, 855 F.2d 723, 726-27 (11th Cir., 1988), have specifically disapproved focusing on motive or even on efforts to communicate with the public as being inconsistent with *Connick* and contrary to this Court's ruling in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979). Also, several Circuits have dismissed the notion that the involvement of an employee in a dispute with the employer automatically removes the employee's comments from the protected category. *Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir., 1988.) Nor do criticisms of the employer's actions disqualify the speech from the classification of public concern. *Zamboni v. Stamler*, 847 F.2d 73 (3d Cir., 1988); *Hale v. Ford*, 856 F.2d 255 (D.C. Cir., 1988).

Using the *Connick* test subjectively leads reviewing courts to base their decisions as to the public nature of the speech at least partly on their perceptions of the value of the speech. Such a tendency is only a step away from censorship of "undesirable" ideas. Compare the Fourth Circuit's determination in *Berger v. Battaglia*, 779 F.2d 992 (4th Cir., 1985) that plaintiff's performing off duty in

blackface was entertainment and, as such, fell within the realm of public interest with the Sixth Circuit's decision denying protection to a teacher who showed her class the film "Pink Floyd-The Wall" in *Fowler v. Board of Education of Lincoln County, Kentucky*, 819 F.2d 657 (6th Cir., 1987). Similarly, the Tenth Circuit in *Koch v. City of Hutchinson*, 847 F.2d 1435 (10th Cir., 1988) held that a fire marshall's report that a fatal fire was caused by arson was not of public concern, but in *Conaway v. Smith*, 853 F.2d 789 (10th Cir., 1988) determined that an electrical inspector's refusal to release substandard work was speech of public importance. Newspaper publication of an audit report divulged by an employee in *Jurgensen v. Fairfax County*, 745 F.2d 868 (4th Cir., 1984) and of an interview with a teacher forced to resign his coaching duties in *Vukadinovich v. Bartels*, 853 F.2d 1387 (7th Cir., 1988) were held not to be matters of public concern. However, a published interview of an employee claiming harassment because of her race and her relationship to a court witness in *Rode v. Dellarciprete*, 845 F.2d 1195 (3d Cir., 1988) was found to be an issue of public concern.

In those cases where the nature of the speech is judged subjectively as in the instant cause, the determination often appears to cloak simple disagreement with the outcome reached by the jury. (See, e.g. *Koch, supra*) Public employee free speech rights are far too important to submerge in a murky quagmire where appellate courts invoke an "objective" test to alter a result which is otherwise supported by the record. As this Court has previously observed, such employees are often the persons most informed about the workings of and faults in public agencies. *Pickering v. Board of Education*, 391 U.S. 563 (1968). For the courts to suppress some speech on otherwise public issues because they disagree with the substance or the manner of what is said is no better than the agencies' doing the same thing. The more clear and objec-

tive the test, the less subject the speech will be to the whim of either the agency or the court system.

B. THE DECISION BELOW EMPLOYED A SUBJECTIVE BALANCING TEST, CREATING IMAGINED HARM TO OUTWEIGH FREE SPEECH, AT ODDS WITH OTHER APPELLATE OPINIONS

Pickering v. Board of Education, 391 U.S. 563 (1968) first established a balancing test to judge whether the employer's interests outweighed the employee's. The *Connick* Court, in endorsing that test, lowered the standard for the employer so that no actual harm need be proven. Although in *Rankin v. McPherson*, ___U.S.___, 107 S.Ct. 2891 (1987) this Court somewhat clarified the weight to be given to potential "disruption" in the balancing process, the evaluation is often very subjective.

The Court below extrapolated great disruption from a scanty record by applying a subjective standard. The only proof of "disruption" was the testimony of two employees that they were embarrassed by Hesse's questions at the teachers' conference. It seems clear that if the *Pickering/Connick* balancing is allowed to be applied subjectively, it can simply serve as a mechanism to set aside a jury verdict which is supported by the record but with which the reviewing court disagrees. It should be noted that the defendants in the instant case claimed Hesse was not punished either for his speech or its effects. It was claimed that his teaching was deficient to such an extent that a Notice to Remedy was required. That claim was found by the jury to be false.

The Court of Appeals took little or no note of the fact that a teacher is not like a police officer or an assistant district attorney. On the contrary, this Court has long recognized the significant public interest in maintaining academic freedom of teachers. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Keyishian v. Board of Regents*, 385 U.S.

589 (1967). Since no close working relationship or strict discipline is required of a public school teacher, a greater degree of actual disruption should be required to outweigh the employee's free speech rights. *Rankin v. McPherson*, ___U.S.___, 107 S.Ct. 2891, 2900 (1987); *Jurgensen v. Fairfax Co.*, 745 F.2d 868 (D.C. Cir., 1984).

Application of the balancing test as an objective standard eliminates such problems. In *Jackson v. Bair*, 851 F.2d 714, 722 (4th Cir., 1988) the court suggested, "when the employer acts on mere potential for disruption, there must be an *objectively justifiable* basis for his apprehension." (Emphasis added.) Similar standards have been enunciated in other circuits. *Zamboni v. Stamler*, 847 F.2d 73, 78 (3d Cir., 1988); *American Postal Workers Union v. United States Postal Service*, 830 F.2d 294, 303 (D.C. Cir., 1987).

The use of the subjective test by the reviewing Court further ignores the fact that testimony of witnesses about claimed harm to the employer is important to the weight given to each side in the balance. The trial court is in a far better position to determine whether the disruption is merely a subjective fear of a supervisor, a "red herring" or a genuine problem. In the case at bar, the reviewing court substituted its own determination of what harm had been done for that of the trial judge who observed and heard the witnesses.

Where no concrete damage to the interests of the employer can be shown, particularly where the employee is not in any policy making or close personal relationship position, the reviewing court should not be permitted to engage its imagination to weight the balance in favor of the employer.

II. THE DECISION RAISES IMPORTANT AND RECURRING PROBLEMS CONCERNING THE APPROPRIATE TEST OF PUBLIC EMPLOYEE SPEECH

The test enunciated by the Court in *Connick* has been unevenly applied by the various federal courts leading to decisions that are difficult to reconcile. The opinion has been criticized as adding rather more heat than light to the problem. See, Note, "Public Employees and the First Amendment: *Connick v. Myers*," 15 *Loyola Univ. L.J.* 293 (1984); " The Public Employee's Right of Free Speech: A Proposal for a Fresh Start," 55 *Univ. of Cincinnati L.Rev.* 449 (1986-87); "*Connick v. Myers*: New Restrictions on the Free Speech Rights of Government Employees," 60 *Indiana L.J.* 339 (1984-85).

Over 20 decisions by Federal Appeals Courts involving First Amendment rights of public employees have been reported during 1988 alone. Of that number at least six have dissenting opinions, some of which take sharp issue with the majority's application of the test to the facts of the case. See, e.g. *Greenberg v. Kmetko*, 840 F.2d 467 (7th Cir., 1988). Given the array of decisions, both public employees and public officials must have some difficulty predicting whether certain types of speech will be granted protection. This Court should take the opportunity now to clarify the manner in which lower courts should judge such cases.

CONCLUSION

For these reasons, a writ of Certiorari should issue to review the Judgment and opinion of the Seventh Circuit.

Respectfully submitted,

MARILYN F. LONGWELL
29 South LaSalle Street
Suite 334
Chicago, Illinois 60603
(312) 263-4730

Attorney for Petitioner

Dated: December 8, 1988

APPENDIX

No. 88-

In The
Supreme Court of the United States
October Term, 1988

DAVID HESSE,

Petitioner,

v.

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, COOK COUNTY, ILLINOIS, ROBERT CREEK, ANNA COUNTRYMAN, ANNE KOLLER, JOSEPH MARCHIORI, JAMES ROGERS, ROBERT SEGER, RICHARD C. KOLZE and JACK GAZA,

Respondents.

On Writ Of Certiorari To The
United States Court of Appeals
For the Seventh Circuit

APPENDIX

1. District Court Order and Final Judgment dated June 4, 1986.

2. Court of Appeals opinion of June 10, 1988 (848 F.2d 748).

3. United States Court of Appeals for the Seventh Circuit Order and Final Judgment dated June 10, 1988.

4. United States Court of Appeals for the Seventh Circuit Order Amending Opinion dated July 7, 1988.

5. United States Court of Appeals for the Seventh Circuit Order Denying Petition for Rehearing and Suggestion for Rehearing *en banc* dated September 9, 1988.

UNITED STATES DISTRICT COURT
NORTHERN ILLINOIS, EASTERN DIVISION

DAVID HESSE,

v.

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, et al

DOCKETED
June 6, 1988

85 C 9863

Judge
Nicholas J. Bua
Presiding.

☒ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that plaintiff, DAVID HESSE, recover of defendants, BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, ROBERT CREEK, ANNA COUNTRYMAN, ANNE KELLER, JOSEPH MARCHIORI, JAMES ROGERS, ROBERT SEGER, RICHARD C. KOLZE, and JACK GAZA, the sum of One Hundred Twenty-Five Thousand and no/100 ($125,000.00) Dollars, plus attorney's fees, with interest thereon at the legal rate, together with his costs of action.

CLERK
H. STUART CUNNINGHAM

DATE
June 4, 1986

DEPUTY CLERK
/s/ Frances D'Andea

In the
United States Court of Appeals
For the Seventh Circuit

No. 87-1522

DAVID HESSE,

Plaintiff-Appellee,

v.

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, COOK COUNTY, ILLINOIS, ROBERT CREEK, ANNA COUNTRYMAN, ANNE KOLLER, JOSEPH MARCHIORI, JAMES ROGERS, ROBERT SEGER, RICHARD C. KOLZE and JACK GAZA,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 85 C 9863—**Nicholas J. Bua**, *Judge.*

ARGUED SEPTEMBER 25, 1987—DECIDED JUNE 10, 1988

Before FLAUM and MANION, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

ESCHBACH, *Senior Circuit Judge.* David Hesse, plaintiff-appellee, prevailed in a jury trial on his claim filed under 42 U.S.C. § 1983 for alleged abridgments of his rights under the First and Fourteenth Amendments to the United States Constitution. The defendants in this action are the Board of Education of Township High School in Cook County, Illinois, the seven individual members of the Board, the superintendent of the Township High

School District and the principal of Schaumburg High School. The plaintiff asserted jurisdiction in the district court on the basis of 28 U.S.C. §§ 1331 and 1343. We have jurisdiction to review the final judgment under 28 U.S.C. § 1291. Hesse sought both damages and equitable relief, alleging that the defendants took adverse retaliatory job action against him as a result of the exercise of his right to freedom of expression.

The appellants challenge the verdict on several grounds. They claim that: 1) the plaintiff's statements did not involve matters of public concern because of their personal content; 2) that even if the plaintiff's statements did involve a matter of personal concern, the defendants' interest in maintaining discipline, harmony and efficiency in the public education system outweighed the plaintiff's interest as a citizen in making such statements; 3) that the instructions to the jury were in error; 4) that the job action taken would have occurred irrespective of the plaintiff's expressions; 5) that certain expert testimony should not have been admitted; and 6) that the verdict was excessive in amount. Initially, we dismissed the first appeal of this case because judgment on the jury verdict for damages had left unresolved the plaintiff's claim for equitable relief, but the district court subsequently entered equitable relief for the plaintiff. We will reverse the judgment of the district court and remand with instructions to enter judgment for all the defendants[1] and against the plaintiff.

I

Hesse has taught at schools in the defendants' school district since 1972, and is a tenured teacher. He teaches classes in both art and photography. Between 1972 and 1985, Hesse taught at Schaumburg High School. During the 1985-86 school year, Hesse served as a traveling teach-

[1] After trial, the district court judge suggested a remittitur of a portion of the $125,000 verdict for the plaintiff, but no formal order was ever entered.

er between Hoffman Estates High School and Palatine High School. This transfer to a traveling teacher status for one year underlies the plaintiff's contentions that the defendants took adverse job action against him to retaliate for his expressions on matters of public concern and interest. In addition to this transfer, the plaintiff alleges that the defendants harassed him by requiring him to submit his daily lesson plans to them, forcing him to undergo more classroom evaluations than other teachers, and manipulating his 1984-85 teaching schedule to make it less desirable to him. However, the plaintiff does not complain that any of the job action taken resulted in a diminution of his salary.

As far back as 1978, Hesse's teaching evaluations contained criticisms of his performance. They contained criticisms of his grading policies, of the lack of motivation of his students, of his inability to maintain student discipline and similar matters. For instance, we note from the record that an evaluation dated December 8, 1978 indicated that 93% of the plaintiff's students in Photography I received D's and F's that term. Numerous other evaluations contained negative ratings based on inadequacies in the plaintiff's performance. Not all of Hesse's evaluations were negative, however. Good and even excellent performance ratings were interspersed throughout the evaluations. Nevertheless, the record is clear that the negative evaluations created within Hesse a deep sense of personal animosity toward his superiors, a bitterness evidenced by his personal attacks against these various school officials in the many memoranda that he wrote to them. These memoranda were often sarcastic, unprofessional and insulting in nature. While some of them did criticize school rules or policies, most of the criticisms were not voiced out of a concern for the public. Instead, they merely defended the plaintiff's personal teaching methods.

The plaintiff's personnel record with the school district is replete with evidence of Hesse's personal animosity toward the school officials, and its ultimate disruption to the school environment. Aside from his many rancorous

memoranda reacting to his poor evaluations, Hesse's personnel record details several unprofessional displays of hostility. As an example, in one month the plaintiff referred an unprecedented 42 students to the administration for disciplinary action. In another incident, Hesse threw a temper tantrum in class before his students. The plaintiff's behavior at a March 2, 1984 faculty symposium held at Schaumburg High School, a meeting all teachers were required to attend, exemplifies the plaintiff's disruptive hostility. At the request of the guest speaker, several rows of seats in the back of the hall had been taped off in order to move the audience forward for enhanced visibility and audibility. Resentful of this procedure and apparently of the entire meeting itself, Hesse sat down in the taped area and invited other teachers to follow suit. During the speaker's question and answer session, Hesse embarrassed the other teachers by asking the guest speaker pointed questions pertaining to Hesse's conflicts with the school administration, but unrelated to the speaker's topic. Following this incident, the school principal sent Hesse a memorandum reprimanding him for his behavior at the symposium. In response, Hesse sent back a sarcastic memorandum attacking the school officials, and containing insulting suggestions.

On June 1, 1984, the school board sent the plaintiff a request to undergo psychiatric examination. On the same day, the plaintiff was also given a "Notice to Remedy," which under Illinois law is an early step in the process which may lead to the dismissal of a tenured teacher. However, the request for psychiatric examination was later withdrawn at the request of plaintiff's counsel.

For the 1985-86 school term, the plaintiff was assigned to serve as a teacher traveling between Hoffman Estates High School and Palatine High School. While the defendants contend that this assignment was necessary because only two of Schaumburg High School's four art teachers were qualified to teach photography, it is this assignment which the plaintiff primarily relies upon as constituting

retaliatory adverse employment action taken against him by the defendants.

II

In analyzing the constitutional protection to be accorded Hesse's speech, we must first determine whether the context, content and form of Hesse's statements as revealed by the record as a whole indicate that they were on a matter of public concern. *See Connick v. Myers*, 461 U.S. 138, 147-48, 103 S. Ct. 1684, 1690 (1983). The district court instructed the jury that the "plaintiff's statements on the subject of grading and student discipline policies and teacher evaluation procedures constitute speech on matters of public concern and are therefore entitled to constitutional protection." We have considered the plaintiff's expressions from the standpoint of their content, form and context as revealed by the entire record, and have carefully examined all of the various memoranda sent by the plaintiff to the defendants. As a matter of law, we can only conclude that but one of Hesse's memoranda arguably related to a matter of public concern.[2] In the con-

[2] Of the memorandums written by the plaintiff which were introduced into evidence, three defended Hesse's method of supervising students, two constituted his personal response to complaints voiced by parents and students, three concerned the poor teaching evaluations which Hesse received from the administration, two defended Hesse's severe grading policies, two responded to the school administration's criticism of Hesse's behavior at the March 2, 1984 faculty symposium, and three alleged that the school administration was harassing Hesse.

The dissent perfunctorily concludes that Hesse's statements during the Board meeting on October 13, 1984 and during the March 2, 1984 faculty symposium constitute speech on matters of public concern because they touch on matters generally relating to public education. However, *Connick* requires us to analyze the form and context of the speech, as well as the content. We note that the subjects that Hesse allegedly discussed relate to the teaching prac-

(Footnote continued on following page)

text of this case, we hold that the jury instruction constituted prejudicial error.

With the exception noted above and hereinafter described, each of Hesse's memoranda dealt primarily with matters of personal interest to the plaintiff. Under these circumstances, we are not at liberty to review the wisdom of the personnel decision made by the defendants in this case. As the Supreme Court stated in *Connick*: "We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appro-

---

[2] *continued*

tices for which he had been criticized. The dissent does not proffer any evidence from the record to show that Hesse's statements were more than part of a long-running defense of his teaching practices. In its application of *Pickering* to the faculty symposium incident, the dissent even concedes that Hesse's comments were clearly related to his own negative evaluations.

In Section III and footnote 1 of its analysis, the dissent cites *Rode v. Dellarciprete*, No. 87-5368 (3d Cir. April 28, 1988), for the proposition that an employee's speech arising out of his personal grievance, but dealing with a matter of public concern, may be protected by the first amendment. Hesse's situation is distinguishable from *Rode* precisely because most of Hesse's speech did not deal with an issue of public concern. In *Rode*, a civilian employee of the Pennsylvania State Police ("PSP") had been suspended for a published interview she had given from her home which criticized the PSP. Although Rode's complaints were couched in terms of her employment problems with the PSP, her concerns were more than mere personal grievances. As the Third Circuit noted:

> Rode did not merely claim that she was being mistreated—she claimed that she was a victim of retaliation arising out of racial animus within the PSP. This is a matter of grave public concern, especially in light of the prior protracted history of litigation against the PSP charging it with racial animus in its employment practices . . . .

Rode v. Dellarciprete, No. 87-5368, slip op. at 12 (3d Cir. April 28, 1988).

priate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.* at 147, 103 S. Ct. at 1690. While it cannot be gainsaid that educational policies in a public school are matters of public concern, all but one of the plaintiff's memoranda and statements were directed to the defense of his personal teaching methods and his resentment of the evaluations and criticisms of those methods. "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case." *Id.* at 149, 103 S. Ct. at 1691.

Even though some of Hesse's memoranda tangentially included general references to public education, an analysis of each memorandum clearly indicates that the memoranda themselves were not intrinsically on a matter of public concern. This Court has noted that "there is a difference between criticism directed at the institution in general and disputes with which the complainant has an intimate personal involvement." *Egger v. Phillips*, 710 F.2d 292, 318 (7th Cir. 1983) (en banc). The fact that a public employee's "verbalized reason for [his lack of cooperation] was a criticism of the institution does not significantly alter the essentially private nature of the dispute." *Id.* at 318. This court has recently reaffirmed its stance that even though an expression may inherently deal with a matter of public concern, the *Connick* test " 'requires us to look at the *point* of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?' " *Callaway v. Hafeman*, 832 F.2d 414, 417 (7th Cir. 1987) (quoting *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985)). The Eleventh Circuit has also noted that "a public employee may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions

are run." *Ferrara v. Mills*, 781 F.2d 1508, 1515-16 (11th Cir. 1986). The text of the various memoranda makes clear that Hesse was not attempting to speak out as a citizen concerned with the problems facing the school district, but was instead attempting to articulate his own private disagreement with policies and procedures which he had either failed to apply or refused to follow.

As previously indicated, only one of the plaintiff's memoranda was arguably directed to a matter of public concern. In the plaintiff's memorandum of December 8, 1984, addressed to the members of the school board and officials at Schaumburg High School, the plaintiff argued that the district's grading policy allowed students to pass regardless of whether they possessed the basic skills required of high school graduates. We consider this memorandum not only under all of the circumstances, but also in isolation. It is far less sarcastic[3] and offensive than the other memoranda, and its primary objective is to criticize the overall grading policy in the school district.

Assuming that the December 8, 1984 memorandum is one dealing with a matter of public concern, we must then consider whether the interests of the plaintiff, as a citizen, in commenting upon a matter of public concern outweigh the interests of the school district and its officials in promoting the efficiency of the public educational system. *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S. Ct. 1731 (1968). This Court has stated the test as "whether the adverse action taken by the defendants is likely to chill the exercise of constitutionally protected speech." *McGill v. Board of Educ.*, 602 F.2d 774 (7th Cir. 1979). In es-

[3] Footnote 10 of the dissenting opinion misconstrues our reference to sarcastic speech. We are *not* implying that sarcastic speech is not entitled to constitutional protection. We only note the sarcastic form of Hesse's speech as a measure of its disruption to the workplace, as well as its highly personal tenor. *See, e.g., Callaway v. Hafeman*, 832 F.2d at 417; *Linhart v. Glatfelter*, 771 F.2d at 1010.

sence, we must decide whether the school board was justified in taking the alleged retaliatory action that it did against the plaintiff. In this regard, we must evaluate the need of the school district to maintain harmony and discipline among co-workers in the workplace, as well as the need to assure that the employee can competently perform his duties. *See Egger v. Phillips*, 710 F.2d at 318. Other things we must consider include the employer's need for confidentiality, the need for a close working relationship between the employer and employee, *id.* at 319, and the context in which the dispute arose. *See Connick*, 461 U.S. at 153, 103 S. Ct. at 1693. *See also Yoggerst v. Stewart*, 623 F.2d 35, 40 (7th Cir. 1980); *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972, 93 S. Ct. 2148 (1973).

In striking a proper balance, it is essential that we note the increasing hostility and deteriorating employment relationship which had been developing between the plaintiff and his superiors for almost five years preceding the alleged adverse job action. The plaintiff's conduct at the March 2, 1984 faculty symposium illustrates the depths to which the relationship had disintegrated, as well as the disruption to the workplace. The plaintiff not only defied the procedures and planning for the meeting, but also openly invited other teachers to join his demonstration. In the five years preceding Hesse's transfer to traveling teacher status, the memorandum of December 8, 1984 was the only one of Hesse's memoranda that arguably dealt with a matter of public concern. This memorandum concerned a sensitive issue for which the plaintiff had been reprimanded by the administration. As the Supreme Court noted in *Connick*, "[w]hen employee speech concerning office policy arises from an employment dispute concerning the very application of the policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office." 461 U.S. at 153-54, 103 S. Ct. at 1693. By the time of this memorandum, the plain-

tiff's intense hostility had created an atmosphere detrimental to workplace harmony and cooperation. The efficiency of the public educational system as it involved the plaintiff was adversely impacted.

In view of the district court's erroneous instruction to the jury, which permitted the jury to treat almost all of the plaintiff's memoranda as protected by the Constitution, the verdict was understandable. However, we must conclude that the interests of the school officials in promoting the efficiency of its public educational services far outweighed the interests of the plaintiff as a citizen in commenting upon the grading policies. As a matter of law, this is the only conclusion we can reach from an examination of the record as a whole.[4]

III

While the jury was not instructed that as a condition for recovery it must find that the protected expression was a substantial or motivating factor in the adverse job action, *Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 576 (1977); *see also Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 416, 99 S. Ct. 693, 697 (1979), we need not, and in the context of a jury

[4] The dissent categorically concludes that Hesse's memorandum is constitutionally protected by artificially viewing the memorandum in isolation. While we do not contend that context is the determinative factor in the *Pickering* balance, in Hesse's case, the long-standing dispute between the parties cannot be ignored in reviewing the record. In *Connick*, the Supreme Court found that a questionnaire distributed by an assistant district attorney to other district attorneys in the office contained one issue of public concern, but on balance concluded that the questionnaire as a whole was not protected. The questionnaire was determined to be an act of insubordination by the plaintiff in reaction to her impending transfer. 461 U.S. at 151-54, 103 S. Ct. at 1692-94. Hence, Hesse's memorandum must be considered from the vantage point of its cumulative disruptive effect on the Board's ability to maintain harmony and discipline in the workplace.

trial, should not determine whether the defendants would have taken the same job action without regard to the memorandum of December 8, 1984. While it would have been difficult, if not impossible, for a reasonable jury to have concluded that the single memorandum of December 8, 1984 was a substantial or motivating factor in the adverse job action, that causal determination is uniquely a jury question.

While it would have been possible for us to remand for a new trial with appropriate determinations and instructions from the trial court,[5] we have determined as a matter of law under *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S. Ct. 1731 (1968), that judgment should have been entered for the defendants and against the plaintiff.[6]

IV

We therefore reverse the judgment of the trial court and remand with instructions to enter judgment for all defendants.

REVERSED.

---

[5] Footnote 9 of the dissenting opinion miscomprehends our *arguendo* argument. We are merely noting that if we had concluded that Hesse's memorandum of December 8, 1984 satisfied the *Pickering* calculus, we would then have to remand this case for the jury's determination of whether the memorandum was a motivating factor in the transfer. *See Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. at 287, 97 S. Ct. at 576. We surmise that even if we had remanded, a reasonable jury, after considering all of the disruptive and unprotected statements made by Hesse, would have concluded that the memorandum did not trigger the transfer. We reject the dissent's contention that the mere proximity in time of the grade fraud memorandum and the October 13 speech before the Board of Education to the transfer makes them the motivating cause of the transfer. However, our consideration of this issue does not constitute a basis of our holding, since this issue is clearly one for the jury.

[6] In view of our disposition of this case, we do not consider other alleged errors in the jury instructions, the admission of expert testimony or the excessiveness of damages.

FLAUM, *Circuit Judge*, dissenting.

I respectfully dissent. I believe the majority errs in concluding that none of Hesse's speech is constitutionally protected. Because I conclude that there are at least two instances of protected speech, I would remand for a new trial to allow a jury to determine whether Hesse's constitutionally protected speech was a substantial or motivating factor in the defendants' decision to transfer him. If so, the defendants would then have an opportunity to demonstrate that they would have taken the same action in the absence of Hesse's protected exercise of his first amendment rights.

I.

A three-step analysis is required where a public employee's first amendment rights are at issue. *Knapp v. Whitaker*, 757 F.2d 827, 845 (7th Cir.), *cert. denied*, 474 U.S. 803 (1985). First, the court must determine whether the plaintiff's speech is constitutionally protected. This is a question of law. *Connick v. Myers*, 461 U.S. 137, 148 n.7 (1983); *Mt. Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Educ.*, 391 U.S. 563 (1967); *Knapp*, 757 F.2d at 839, 845. If the plaintiff's speech is protected by the first amendment, then two issues of fact must be addressed. The first factual issue is whether the defendant's actions were motivated by the plaintiff's constitutionally protected speech. *Knapp*, 757 F.2d at 845. If the plaintiff can demonstrate that his or her constitutionally protected speech was a substantial or motivating factor in the defendant's actions, the defendant must then have an opportunity to prove that it would have taken the same action in the absence of the plaintiff's exercise of his or her first amendment rights. *Id.*

II.

To determine whether Hesse's speech is constitutionally protected, a two-part analysis is necessary. *Id.* at 839.

First, the court must decide whether Hesse's speech dealt with a matter of public concern. *Connick*, 461 U.S. 137. If so, the court must then employ a balancing test (the "*Pickering* balance") to determine whether or not the speech is constitutionally protected. *Pickering*, 391 U.S. 563.

A.

In order to determine whether Hesse's speech dealt with a matter of public concern the court must look at the "content, form, and context" of Hesse's statements. *Connick*, 461 U.S. at 147.[1] Several of Hesse's statements were personal in nature; they related solely to Hesse's disagreements with the schools' administrators over his

[1] The majority argues that in reaching the conclusion that some of Hesse's speech was related to matters of public concern I fail to consider the form and context of his speech. I respectfully disagree. The *Connick* "matter of public concern" test and the *Pickering* balance are independent analyses which must be applied consecutively to determine whether a public employee's speech is protected under the first amendment. The form, content and context of an employee's speech can lead to the conclusion that it is related to a matter of public concern; yet, the court may subsequently conclude under the *Pickering* balance that the speech is not protected by the first amendment.

Just as the content alone of an employee's speech cannot insure first amendment protection, neither can the context of the speech automatically remove that protection. The mere fact that an employee is involved in an ongoing dispute with his or her employer does not mean that as a matter of law his or her speech can never relate to a matter of public concern under *Connick*. In fact, in *Connick* itself the Court held that some of the plaintiff's speech related to a matter of public concern, even though the plaintiff was involved in an ongoing dispute with her supervisor. *Connick*, 461 U.S. at 149. *See also Rode v. Dellarciprete*, No. 87-5368, slip op. at 9-14 (3rd Cir. April 28, 1988) (employee's speech dealing with matter of public concern protected by first amendment even though speech arose out of employee's personal employment problem).

negative evaluations, class assignments, and relationship with the administration. This speech is not related to any matter of public concern and therefore I agree with the majority that it is not protected by the first amendment. Some of Hesse's speech, however, dealt with the district's disciplinary policies for students, grade fraud, and the procedures for evaluating teachers' performances. Each of these issues relates directly to the quality of education in the Schaumburg School District and therefore I would find that this speech addressed matters of public concern.[2] These were the issues Hesse raised during a faculty symposium on March 2, 1984, in speeches before the Board of Education, and in his grade fraud memorandum of December 8, 1984. Because each of these statements addressed

---

[2] Not every instance of an employee's speech will share the same form, content and context. Simply because some of an employee's speech is not protected by the first amendment, either because it is not related to a matter of public concern under *Connick* or is not protected under the *Pickering* balance, it does not necessarily follow that none of the employee's speech is protected. The district court erred in this case because it improperly instructed the jury that all of Hesse's speech was protected. The majority errs because it improperly concludes that none of Hesse's speech is constitutionally protected. The proper approach is to apply the appropriate legal analysis to each instance of Hesse's speech to determine its protected status.

In *Knapp*, for instance, this court analyzed a teacher's speech and concluded that his statements to the school board regarding his evaluations and class assignments did not address matters of public concern and were therefore unprotected. His statements about the travel reimbursement for coaches, the sufficiency of the school's liability insurance for athletic activities, and complaints about the district's grievance procedures, however, were of interest to the community and therefore dealt with matters of public concern. *Knapp*, 757 F.2d 827. *See also Connick*, 461 U.S. 137 (one question in an employee's questionnaire asking co-workers if they felt pressure to work on specified political campaigns dealt with an issue of public concern, but the remainder of the questionnaire did not).

matters of public concern, the court should apply the *Pickering* balance to determine whether they are constitutionally protected.[3]

B.

Under *Pickering*, the court must balance the state's interest in an efficient and effective school system with a teacher's right as a citizen to speak out on matters of public concern. "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. The *Pickering* Court considered a number of factors and determined that the plaintiff's speech was protected because: (1) it was not directed at anyone with whom Pickering had contact on a daily basis; (2) Pickering's employment did not require personal loyalty to the school board or superintendent; (3) the speech did not disrupt harmony among his co-workers; and (4) Pickering's immediate supervisors' ability to maintain discipline was not negatively affected by the speech. *Id.* at 569-70. In *Connick*, although a portion of the plaintiff's speech touched upon a matter of public concern, the Court concluded that under the *Pickering* balance it was not constitutionally protected. *Connick*, 461 U.S. at 149-54. In reaching this conclusion, the Court considered several factors including: (1) whether the speech negatively affected the plaintiff's ability to perform her job; (2) the need for a close working relationship between the plaintiff, Myers, and her supervisor, Connick; (3) the time, place and manner of the speech; and (4) the con-

[3] The majority agrees that Hesse's memorandum of December 8, 1984 addressed a matter of public concern. The majority, however, neglects to consider the constitutionally protected nature of Hesse's speeches on the same topic before the Board of Education on October 13, 1984 and other occasions. See *infra* note 6.

text of the underlying dispute between Myers and Connick. *Id.* at 150-54.[4]

Hesse's memorandum of December 8, 1984 was directed to the Principal of Schaumburg High School and members of the Board of Education. It summarized the points Hesse made in his presentation to the Board of Education on October 13, 1984 regarding his perception that there was significant grade fraud at Schaumburg High School. Hesse's concern was with a policy the district had adopted which required teachers "*not to use the actual percentage a student achieves in each nine week period and on the final exam* when they average out the final semester grade." December 8, 1984, Grade Fraud Memo (emphasis in the original). Hesse's disagreement with this policy resulted from his conclusion that

> the current policy is simply very effective at passing students who would otherwise fail if their actual percentage scores were used to determine their grades. I believe that this is a deceptive practice that makes the public think the district is doing a far better job than it actually is. But, the greatest harm is that such an illogical method of averaging scores sends students into the job market without the necessary knowledge they need to function on the job.

Id.

This memorandum was directed both at persons with whom Hesse had daily contact at Schaumburg High School and at members of the Board of Education with whom he had no daily contact. The memorandum did not have

[4] Myers' speech arose in the context of a personal dispute between Myers and Connick regarding her pending transfer to another office. In the context of this dispute, Myers' speech threatened to disrupt the office, undermined Connick's authority, and had the potential to destroy necessarily close working relationships in the office. As a result, the Court concluded that Myers' first amendment rights were outweighed by the government's interest in effectively providing services to the public. *Connick*, 461 U.S. at 154.

the potential to undermine the principal's ability to maintain discipline in the school, nor should it have affected the harmony among Hesse's fellow teachers. Furthermore, this speech did not arise directly out of the context of a personal dispute. I would therefore conclude, as a matter of law, that Hesse's first amendment right to speak out as a citizen on this matter of public concern was not outweighed by the state's interest in providing an efficient public educational system. I would hold that this memorandum is constitutionally protected speech.[5]

Similarly, Hesse's October 13 speech before the Board of Education also involved the issue of grade fraud.[6] The same *Pickering* factors can be applied to this instance of speech, yielding the conclusion that it is also protected by the first amendment. This speech could not have undermined the principal's ability to maintain discipline in the school; it did not affect the harmony among Hesse's fellow teachers; it did not directly arise in the context of a dispute between Hesse and the school administration;

---

[5] In applying the *Pickering* balance to Hesse's December 8 memorandum, the majority places undue weight on the nature of Hesse's relationship with the school's administration. The nature of this relationship, however, is neither the sole nor the most important factor in the balance.

[6] At trial Hesse testified that he spoke before the Board of Education on approximately eight separate occasions during the fall and winter of 1984-85. On these occasions Hesse spoke about the problems of student discipline in public education, grade fraud, competency testing for students and teachers, and teacher evaluation procedures. If this case were remanded, each of these instances of public speech would have to be analyzed to determine whether under *Connick* and *Pickering* they are protected by the first amendment. To the extent that Hesse was speaking about grade fraud and general disciplinary problems in public education, this speech relates to matters of public concern. Unless these other occasions involved different factors than those present when Hesse spoke to the Board of Education on October 13 about the issue of grade fraud, applying the *Pickering* balance to these additional instances of speech should lead to the conclusion that they are also protected by the first amendment.

and the time, place and manner of the speech were appropriate.

Hesse's third instance of speech on a matter of public concern occurred at a faculty symposium on global education on March 2, 1984. At the symposium, Hesse asked the guest speaker various questions related to the topic of proper teacher evaluation procedures. Hesse voiced his complaint that the procedures utilized at Schaumburg High School were improper because they allowed students to evaluate their own teachers. Hesse argued that to ensure positive evaluations, teachers were pressured to give their students higher grades than they deserved.

Applying the *Pickering* balance to this speech, I would conclude that it is not constitutionally protected. First, Hesse spoke out at a mandatory faculty symposium which most of the Schaumburg High School faculty attended. The time, place and manner of Hesse's speech therefore posed a significant threat to the harmony between Hesse and his co-workers, to Hesse's employment relationship with his colleagues and superiors, and to the principal's ability to maintain discipline in the school. Several of the faculty members testified that Hesse's actions at the symposium were both offensive and embarrassing. Furthermore, some of the questions arose out of a dispute Hesse was having with his superiors regarding his own negative evaluations.[7] In this situation, the state's interest in pro-

[7] The majority asserts that because I "concede" that some of Hesse's questions at the faculty symposium arose out of a dispute between Hesse and the school's administration, that this speech could not have been related to a matter of public concern under *Connick*. As previously noted, however, this argument improperly collapses the *Connick* "matter of public concern" test into the *Pickering* balance. See *supra* note 1. *See, e.g., Rode*, No. 87-5368, slip op. at 11 (in determining if speech deals with a matter of public concern, complete reliance on employee's motivation for speaking is inappropriate). Furthermore, the mere fact that Hesse's speech at the faculty symposium may have arisen out of a dispute with his employers is not dispositive of the *Pickering* balance. As is clear from the discussion in the text, a number of factors, of which Hesse's ongoing disagreement with the administration is just one, lead to the conclusion that this speech is not protected by the first amendment.

moting effective and efficient public educational services outweighed Hesse's right as a citizen to speak out on this matter of public concern. I would conclude that this speech is therefore not constitutionally protected under *Pickering*.

C.

Because there are at least two important instances of constitutionally protected speech, I would remand this case for a new trial.[8] Hesse should have the opportunity to have a jury decide whether or not his transfer to a less desirable position was in retaliation for his exercise of his first amendment rights. A reasonable jury could find that Hesse's transfer was in retaliation for his protected speech for a number of reasons. First, Hesse's protected speech occurred much closer in time to Hesse's transfer than any of his unprotected speech. Second, Hesse's speeches to the Board of Education and the December 8 memorandum were directed to persons both inside and outside the Schaumburg High School administration. These instances of speech may therefore have had a greater potential to embarrass the school administrators who made the decision to transfer Hesse. Finally, the question of possible grade fraud is a sensitive issue which could demonstrate that the quality of education in the Schaumburg School District was significantly lower than the public had been led to believe. A jury should therefore be permitted to determine the factual questions of whether the defendants' actions were a result of Hesse's constitutionally protected speech, and whether the defendants would have taken the same action in the absence of this speech.[9]

---

[8] There may be more than two instances of protected speech depending on the specific facts of Hesse's other addresses to the Board of Education during the fall and winter of 1984-85. See *supra* note 6.

[9] The majority's discussion of the propriety of a remand for a new trial creates an unnecessary ambiguity. The majority concludes that Hesse's memorandum of December 8, 1984 is *not* con-

(Footnote continued on following page)

III.

Employees who have no disagreements with the manner in which an institution is run are unlikely to see any problems in need of public attention. As a result, these types of first amendment cases typically involve disgruntled employees. If employees are automatically denied first amendment protection simply because they are involved in some type of dispute with their employer, serious issues of public concern will never be brought to light. *See Rode v. Dellarciprete*, No. 87-5368, slip op. at 12 (3rd Cir. April 28, 1988) ("Dismissing Rode's speech as unprotected merely because she had a personal stake in the controversy fetters public debate on an important issue because it muzzles an affected employee from speaking out."). An employer who takes adverse action against a disgruntled employee because the employee is disrupting the workplace, rather than in retaliation for the employee's exercise of his or her first amendment rights, will prevail.

The majority places undue emphasis on what it sees as the cumulative disruptive nature of Hesse's relationship with the defendants.[10] What the majority fails to fully

[9] *continued*
stitutionally protected under *Pickering*. The majority goes on to speculate, however, that "it would have been difficult, if not impossible, for a reasonable jury to have concluded that the single memorandum of December 8, 1984 was a substantial or motivating factor in the adverse job action. . . ." *Supra* at 11. If as a matter of law none of Hesse's speech is constitutionally protected under *Pickering*, there are no remaining factual issues for the jury. Nonetheless, the majority states that "it would be possible for us to remand for a new trial. . . ." *Id.* If one accepts the majority's holding that there is no constitutionally protected speech, a remand would *not* be permissible.

[10] I must also express my disagreement with the impression that the majority creates regarding the extent of first amendment protection for sarcastic speech. The majority appears to argue that sarcastic speech is somehow less deserving of first amendment protection than is "serious" speech. See *supra* at 8. The mere sarcastic nature of otherwise protected speech, however, cannot remove it from first amendment protection. The reader should not be left with a contrary impression.

comprehend is that to prevail an employee must prove not only that his or her speech is protected, but that it was a substantial or motivating factor in the employer's adverse job action. Furthermore, the employer can defend itself simply by showing that it would have taken the same adverse action in the absence of the protected speech. An employer is not prohibited from taking adverse job action against employees who disrupt the workplace, but an employer cannot do so in retaliation for an employee's constitutionally protected right to free speech.

Some of Hesse's speech is deserving of first amendment protection, and I would therefore reverse and remand for a new trial.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—6-10-88—475

JUDGMENT – ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit

June 20, 1988

Chicago, Illinois 60604

June 10, 1988.

Before

Hon. JOEL M. FLAUM, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

DAVID HESSE,
Plaintiff-Appellee,

No. 87-1522 *vs.*

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

85 C 9863

Judge **Nicholas J. Bua** Presiding.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS **ORDERED AND ADJUDGED** by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and the cause is REMANDED, in accordance with the opinion of this Court filed this date.

United States Court of Appeals

For the Seventh Circuit

Jul 11, 1988

Chicago, Illinois 60604

July 7, 1988.

Before

Hon. JOEL M. FLAUM, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

DAVID HESSE,
Plaintiff-Appellee,

No. 87-1522 *vs.*

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, COOK COUNTY, ILLINOIS, ROBERT CREEK, ANNA COUNTRYMAN, ANNE KOLLER, JOSEPH MARCHIORI, JAMES ROGERS, ROBERT SEGER, RICHARD C. KOLZE and JACK GAZA,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

85 C 9863

Judge
Nicholas J. Bua
Presiding.

ORDER

The opinion issued in this case on June 10, 1988 is now amended by deleting from the first line of part III the word "not."

IT IS SO ORDERED.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

Sep 12, 1988

POSTED

September 9, 1988.

Before

Hon. JOEL M. FLAUM, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. JESSE E. ESCHBACH, Senior Circuit Judge

DAVID HESSE,
Plaintiff-Appellee,

No. 87-1522 *vs.*

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT NO. 211, COOK COUNTY, ILLINOIS, ROBERT CREEK, ANNA COUNTRYMAN, ANNE KOLLER, JOSEPH MARCHIORI, JAMES ROGERS, ROBERT SEGER, RICHARD C. KOLZE and JACK GAZA,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

85 C 9863

Judge
Nicholas J. Bua
Presiding.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed by plaintiff-appellee and the answer filed by defendants-appellants, a vote was requested on the suggestion for a rehearing *en banc*. A majority of the members of the original panel voted to deny the petition for rehearing, and the suggestion for rehearing *en banc* did not receive a majority of the votes of judges in active service. Chief Judge Bauer and Judges Flaum and Ripple voted to grant rehearing *en banc*. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *en banc* is DENIED.